IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1037 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge

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RAMABHAI PASHABHAI PATEL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR BHARGAV N BHATT for Appellant(s) : 1,
MR KT DAVE APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 10/05/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.0 By way of this appeal, the appellant has prayed to quash and set aside the judgment and order dated 20th October, 1997 passed by the learned Sessions Judge, Sabarkantha at Himmatnagar in Sessions Case No. 46 of 1997 whereby, the appellant was convicted for offences punishable u/s. 376, 366 & 363 of the Indian Penal Code, 1860 (for short, "the IPC"). For the offence u/s. 376, the appellant was sentenced to undergo rigorous imprisonment for a period of ten years and fine of Rs.10,000/- and in default of payment of fine, further rigorous imprisonment for a period of one year. For the offence u/s. 366, the appellant was sentenced to undergo rigorous imprisonment for a period of three years and fine of Rs.2,000/- and in default of payment of fine, further rigorous imprisonment for a period of six months and for the offence u/s. 363, he was sentenced to undergo rigorous imprisonment for a period of one year and fine of Rs.1,000/- and in default of payment of fine, further rigorous imprisonment for a period of three months. All the sentences were ordered to run concurrently. The appellant was also given the benefit of set-off.

2.0 The facts of the prosecution case are as under ;

On 16.10.1996 at around 11.00 am while the victim was going to her school situated at Idar in a bus, at that time, the appellant, by luring the victim, kidnapped her and took her away to Ambaji and thereafter, to Khedbrahma. At both these places, the appellant and the victim stayed in guest house, where the appellant repeatedly committed rape on the victim.

2.1 On 18.10.1996, the father of the victim filed a complaint before Idar Police Station alleging that the appellant, in connivance with two other accused persons, kidnapped the victim, with a view to take undue advantage, from his residence when the victim alone was present in the house.

2.2 On the said FIR, investigation was carried out. The appellant came to be arrested on 20th October, 1996. As the Investigating Officer found sufficient material against the appellant and two other accused persons, he filed charge-sheet in the Court of learned Judicial Magistrate, First Class, Idar who, in turn, committed the case to the Court of Sessions and Sessions Case No. 46 of 1997 came to be registered.

2.3 The Sessions Court, on the basis of the evidence led by

the prosecution, concluded that the prosecution was successful in establishing the charges against the appellant and recorded conviction and passed sentence, as stated in earlier part of this judgment.

3.0 Mr. Bhargav N. Bhatt learned Advocate for the appellant submitted that the learned trial Judge has committed serious error in law in recording a finding that the appellant was guilty of the offence u/s. 376 of the IPC. He has submitted that the act was done with the consent of the victim, which is clear from the evidence on record in the form of statements of the witnesses and the medical evidence.

3.1 Learned Advocate further submitted that the description of the entire incident as narrated by the victim is highly improbable. He submitted that the appellant is alleged to have kidnapped the victim on 16.10.1996 as per the allegations made in the complaint filed by the father of the victim. The case of prosecution is difficult to believe since at no point of time, the victim had raised any hue and cry or had made any attempts to rescue herself from the custody of the appellant. As per the say of the victim herself, they had visited several public places, which

included Temples also. Therefore, the presumption that the victim might have been under threat or fear and that she had acted as per the instructions of the appellant, is ill-founded and highly improbable. Hence, the conviction recorded by the trial Court for offences u/s. 376 of the IPC is required to be quashed and set aside.

4.0 Learned Advocate submitted that the trial Court has relied upon the documents at Exhibits 33, 37 & 38 so as to ascertain the age of the victim, at the relevant point of time. He submitted that PW-2, the father of the victim, himself has stated in his evidence that the date of birth of the victim, which was registered in the school records of the victim, was only on the basis of a presumption. He further submitted that the evidence led by PW-2, PW-3, PW-5 and PW-7 also do not support the case of the prosecution with respect to the age of the victim at the relevant point of time.

4.1 Learned Advocate contented that the trial Court has erred in appreciating the medical evidence on record led in the form of deposition of PW-3, i.e. the Doctor who had examined the victim as well as the appellant. He submitted that the said witness,

on the basis of certain medical tests / examinations conducted on the victim, has stated that the age of the victim, at the relevant point of time, was possibly anywhere between 17 to 18 years with variation of 2 to 3 years. However, the trial Court has proceeded on the hypothesis and presumption which was having no support from the evidence on record and, ultimately, arrived at the conclusion that the age of the victim, at the relevant point of time, was 16 years one month and 10 days, which is completely illegal and erroneous. Learned Advocate has, therefore, submitted that the appellant – accused cannot be convicted for offence u/s. 363 & 366 of the IPC.

5.0 Mr. Bhatt learned Advocate for the appellant contented that there is contradiction in the evidence led by the victim herself, who has deposed as PW-1. He has submitted that in her evidence, PW-1 has stated that while she was traveling from Village Laloda to Idar, the appellant was standing near the door of the bus and that he had restrained her from getting down from the bus. However, in her cross-examination, the said PW-1 has admitted that the appellant was sitting next to her.

5.1 Learned Advocate further contented that in her cross-

examination, PW-1 has stated that she and the appellant had not got down from the bus at Apollo three roads, i.e. the place where the victim used to get down for going to her school but, had got down at Idar bus-stand only. However, in the complaint filed by the father of the victim, it is alleged that the victim was kidnapped / abducted by the appellant from his house when no one was present in the house. Thus, there is clear contradiction in the entire story put forward by the victim as well as the complainant, which creates serious doubts about the prosecution story.

6.0 Learned Advocate for the appellant submitted that the sentence imposed by the trial Court is very harsh if we consider the facts of the case and, more particularly, the conduct of the victim. Learned Advocate has relied upon a decision of the Apex Court in the case of *Ramashraya Chakravarti V. State of Madhya Pradesh* reported in *(1976) 1 S.C.C. 281* wherein it has been held that several factors are required to be taken care of while considering the quantum of sentence and that a humanitarian approach is required to be taken.

6.1 Learned Advocate has next relied upon a decision in the case of *Ananda Dagadu Jadhav & ors. V. Rukminibai Anand Jadav (Smt.) & anr.* reported in *1993 Suppl. (3) S.C.C. 68*. In that case, the offence was committed about 18 years ago and the accused was facing the proceedings for over 17 years. The Apex Court, considering the facts of the case, reduced the substantive sentence of five years of imprisonment to the period already undergone.

6.2 Learned Advocate has next relied upon a decision in the case of *Raj Rani (Smt.) V. State (Delhi Administration)* reported in *2001 S.C.C. (Cri.) 1518* wherein it has been held that where the suicide note does not indicate that the words mentioned therein were sufficient enough to amount to cruelty, conviction u/s. 498-A cannot be sustained. Learned Advocate has, therefore, submitted that the sentence imposed by the trial Court is required to be reduced.

7.0 Mr. K. T. Dave learned Advocate for the respondent – State supported the judgment and order passed by the trial Court and submitted that the trial Court was completely justified in convicting the appellant for the offences punishable u/s. 376, 363

& 366 of the IPC. He submitted that the appellant, by luring the victim that he would marry her, kidnapped her and, thereafter, repeatedly committed rape on her, by keeping her under constant fear and duress. The said fact is evident from the statement of the prosecution witnesses and the evidence on record. He has, therefore, submitted that no interference is required by this Court in this appeal.

8.0 Heard learned counsel for the parties and perused the documents on record. The document at Exhibit – 13 is the complaint filed by the father of the victim before Idar Police Station on 18.10.1996. In the said complaint, it is alleged that on 16.10.1996, the appellant, with an intention to take unfair advantage, kidnapped the victim when the appellant was alone in the house. However, the victim who has deposed as PW-1 Exhibit – 11 has narrated an altogether different story of the entire incident. She has stated that on 16.10.1996 while she was to get-off from the bus at Apollo cross-roads, in order to go to her school situated at Idar, at that time, the appellant who was standing near the door of the bus, restrained her from getting down off the bus and threatened her of dire consequences, if she didn't accompany him to Ambaji and, therefore, the victim didn't get-

off at Apollo cross-roads and went to Ambaji with the appellant. She has further deposed that at Ambaji, the victim was confined in the room of a guest house and that for three days, the appellant had repeatedly committed rape on her. Thereafter, on the next day, they went to Khedbrahma. At Khedbrahma also, the victim was confined in the room of a guest house and there also, the appellant committed rape on her.

8.1 On a plain reading of the deposition of the victim, it appears that the victim was forcefully taken by the appellant at different places and that, at all those places, the victim was confined in the room of the guest house and the appellant repeatedly committed rape on her.

8.2 However, from the cross-examination of the victim, PW- 1 at Exhibit – 11, it appears that the entire incident took place at her own will and consent. In her cross-examination, she has deposed that after reaching Ambaji, the appellant and the victim had gone to a guest house on foot where they had stayed together for three days. She has further deposed that during their period of stay at Ambaji, the victim had not raised any alarm calls for help nor had tried to rescue herself from the custody of the

appellant. In fact, at the instance of the victim herself, the appellant held her hands while they were going to the guest house from the bus-stand by foot. At Khedbrahma also, the victim had not asked for any help while they were staying in a guest house.

8.3 So, if the case of the victim, as narrated by her in her deposition is taken as it is, then, undoubtedly, at all those places where the appellant had forcefully taken the victim and had repeatedly committed rape on her, the victim would have raised alarm calls for help and would have also tried to rescue herself from the clutches of the appellant. Ambaji and Khedbrahma, being religious places, presumably there would be reasonably big crowd of visitors and it is highly unbelievable that the victim had not raised any alarm calls for help or had not even attempted to inform about the alleged incident to anyone if the case of the victim is believed to be true. If the alleged act was not performed with the consent of the victim, then, undoubtedly, there would have been some efforts on the part of the victim to ensure that the act is not complete. However, that being not the case, evidently, it has to be said that the act was performed with the consent of the victim.

9. The aforesaid fact is also supported by the medical evidence on record. PW-3 is the Doctor who conducted the medical examination of the victim as well as the appellant. The said witness has deposed at Exhibit – 15 that the age of the victim was more than 16 years at the relevant point of time. In his cross-examination, the said witness has stated that if intercourse is done against consent, then necessarily, there would be injury marks in certain parts of the body. The said witness has further deposed that on examination of the victim as well as the appellant, no injury marks were found either in the private portion or in any other portion of the body. Thus, from the deposition of the said witness, it could be concluded that intercourse had taken place with the consent of the parties.

10. From the above discussion and the medical evidence on record, we are of the considered opinion that no offence u/s. 376 is made out against the appellant. Hence, the conviction recorded by the trial Court for the offence u/s. 376 deserves to be quashed and set aside.

11.0 Section 363 of IPC deals with the punishment for

'kidnapping' while Section 366 deals with kidnapping or abduction of a woman with an intention to marry her against her will or in order to force or seduce her to illicit intercourse. Section 363 provides that whoever kidnaps any person from the lawful guardianship shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to pay fine. This Section has to be read with Section 361 of IPC. The offence of kidnapping from lawful guardianship, penalized by this Section, is the offence which is defined by Section 361. The essence of this Section is that the person against whom the offence is committed must be under the age of sixteen, if a male, and under the age of eighteen, if a female.

11.1 In the present case, from the record, it is borne out that the victim was below 18 years of age at the relevant point of time. If we go as per the evidence produced by the father of the victim, PW-2, in the form of School Leaving Certificate of the victim, then the age of the victim, at the relevant point of time, was 16 years 1 month and 10 days and if we go as per the medical evidence on record, then also the age of the victim would be below 18 years and, in no case, would be above 18 years. We find no reason to disbelieve the averments made by

the father of the victim with respect to her age.

11.2 Keeping this fact in mind and considering the evidence of the prosecution witnesses, it has to be said that the appellant had kidnapped the victim from the lawful guardianship of her parents even though there is contradiction in the story as narrated by the father of the victim in his deposition as PW-2 and in the complaint filed by him. Thus, we hold that the appellant is guilty of the offence u/s. 363 & 366 of the IPC.

12.0 Coming to the question of quantum of sentence, Section 363 of IPC provides with imprisonment of either description for a term which may extend to seven years while Section 366 provides with imprisonment of either description for a term which may extend to ten years. Looking to the conduct of the victim and in view of the contradiction in the statements made by the father of the victim as a prosecution witness and as a complainant, we are of the opinion that the sentence imposed by the trial Court is harsh and deserves to be reduced in the interest of justice.

13.0 In the result, the appeal is partly allowed. The

impugned judgment and order dated 20th October, 1997 passed by the learned Sessions Judge, Sabarkantha, Himmatnagar in Sessions Case No. 46 of 1997 is modified to the extent that the conviction of the appellant under Section 376 of the Indian Penal Code, 1860 is quashed and set aside; whereas, the conviction under Sections 366 & 363 of the Indian Penal Code, 1860 are confirmed.

13.1 The sentence for conviction under Section 366 is reduced to rigorous imprisonment for a period of **TWO YEARS** and Fine of Rs.2,000/- (Rupees Two thousand only) and in default of payment of Fine, further simple imprisonment for a period of six months; and, the sentence for conviction under Section 363 is confirmed. Both the sentences shall run concurrently. The appellant is also given the benefit of set-off.

13.2 The additional amount deposited by the appellant with the trial Court pursuant to the order dated 24.10.1997 passed by this Court at the time of granting bail and the amount of compensation of Rs.10,000/- awarded by the trial Court in its judgment, shall be given to the victim, upon proper identification, if not paid so far. The appellant is directed to surrender to the

custody within a period of **FIVE WEEKS** from the date of this judgment and order.

{Anil R. Dave, J.} {K. S. Jhaveri, J.}

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